STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 271085 Wayne Circuit Court
TOMAS FELICIANO, a/k/a NELSON FELICIANO and THOMAS FELICIANO, Defendant-Appellant.	LC No. 05-007340-01

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree murder, MCL 750.316(1)(a) (premeditated), burning of personal property with a value of $20,000 or more, MCL 750.74(1)(d)(i), receiving and concealing stolen property, MCL 750.535(2)(a), and disinterment or mutilation of a human body, MCL 750.160. We affirm in part, reverse in part, and remand.

The circumstances surrounding the death of the victim in this case emerged largely from defendant's police statement and from defendant's own testimony. While defendant and his girlfriend were engaged in a loud argument at their home in Detroit, the victim, a cousin of defendant's girlfriend, walked into the house and asked what was going on. The victim pushed defendant and they began to fight. After the victim was on the floor "knocked out," defendant began kicking the victim's face and head. When defendant's girlfriend told defendant that the victim was related to a neighborhood drug dealer named "Duran," defendant became frightened. Defendant wanted to take the victim outside and leave him in the alley, hoping that he would not remember anything when he awoke. Defendant's girlfriend, however, said that they would have to kill him. They took him into the basement and defendant cut the victim's neck with a pocketknife. Defendant claimed that the victim was still alive after defendant cut him, and his girlfriend subsequently stabbed the victim repeatedly with a large hunting knife and hit him in the head with a hammer. Defendant left the house to find a vehicle they could use to move the victim. When he returned with a GMC Envoy, the victim was dead. Defendant and his girlfriend used the Envoy to dispose of the victim's body, and defendant burned the Envoy the following night.

Defendant's first argument on appeal is that the trial court erred in refusing to redact defendant's discussions regarding plea negotiations from the recorded telephone conversations that were played for the jury. We disagree.

"When the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes the admissibility of the evidence, the issue is reviewed de novo." *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Otherwise, this Court reviews a trial court's decision to admit evidence for an abuse of discretion. *Id*. at 670. "An abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Hine*, 467 Mich 242, 250-251; 650 NW2d 659 (2002).

In this case, the prosecution sought to admit recordings of four telephone conversations defendant had with his sister from jail. Defense counsel argued that several references to plea negotiations in the calls should be redacted. The trial court disagreed, and admitted the entire contents of the four calls, with the exception of one reference to defendant's having been on parole at the time he was arrested in connection with the charges in this case. During the conversations, defendant repeatedly refers to the possibility of pleading guilty to manslaughter or second-degree murder and obtaining a shorter prison sentence. In one call, he says he takes responsibility for his part in the killing, but will not accept "natural life" or 20 to 40 years in prison. In another, he mentions the possibility of being sentenced to a mental institution instead of prison upon a finding of "diminished capacity."

On appeal, defendant acknowledges that MRE 410(4) did not bar the admission of the statements, because they were not made during a plea discussion with a prosecuting attorney. See, also, *People v Butler*, 193 Mich App 63, 69; 483 NW2d 430 (1992). Defendant also acknowledges, the statements were not inadmissible as hearsay because they are statements of a party offered against that party. MRE 801(d)(2). But, defendant argues that the statements were inadmissible because they were not relevant, and, even if they were relevant, they were more prejudicial than probative.

Under MRE 402, all relevant evidence is admissible. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence." Under MRE 403, however, even if it is relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "'[U]nfair prejudice' does not mean 'damaging.'" *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Stated differently, "[r]ule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so. Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Waknin v Chamberlain*, 467 Mich 329, 334 n 3; 653 NW2d 176 (2002), quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

The contents of the telephone conversations were relevant to the prosecution's case because, in addition to first-degree murder, the jury received instructions on second-degree murder, voluntary manslaughter, and self-defense. Especially with respect to voluntary manslaughter and self-defense, the situation and defendant's state of mind at the time of the crime were highly relevant. The conversations tend to make the existence of a reasonable belief that force was necessary, or the existence of a reasonable emotional disturbance, less likely because, even in the context of several discussions about how to secure a lighter sentence such as "diminished capacity" and insanity defenses, defendant never mentions being in fear of the victim or the existence of circumstances that would tend to create an emotional disturbance. On the contrary, defendant's statements in the recordings may tend to show that defendant does not believe he was justified, for whatever reason, in killing the victim. For example, in one call defendant says to his sister, "it's the worst thing I've ever did [sic] in my life."

Moreover, this evidence was not unfairly prejudicial. First, it was more than "marginally relevant." See *Waknin*, *supra* at 334 n 3. Second, in light of defendant's own testimony and statement to police, it is unlikely that the jury gave this evidence "undue or preemptive weight." See *id*. Before the jury heard these recordings, it heard a police officer read defendant's written police statement, including the following:

> When I stood up, I hit [the victim] good. He was knocked out. While he was down, I started kicking him in his face. . . .We took him in the basement, I took out my pocket knife and I cut his neck. . . .We both picked him up and . . . carried him out the back door. We put him in the back of the blue Envoy. We drove over to Keeler behind a trick house. [Defendant's girlfriend] said it would look better. After we dumped his body, we went back and started cleaning up. I cut the whole carpet up and she put bleach down and cleaned up the blood. We got all the stuff up.

Later, the jury heard defendant testify that, among other things, he kicked the victim in the head and face while the victim was on the ground, and cut the victim's throat. It is unlikely that the jury weighed defendant's recorded statements about plea negotiations more heavily that it did his police statement or his own testimony, which contained details about the injuries he inflicted on the victim and about his efforts to conceal the crime that were absent from the telephone conversations.

Defendant's second argument on appeal is that the prosecutor's reference to defendant's trial counsel during closing argument constituted misconduct. Alternatively, defendant argues that his trial counsel's failure to object to this alleged misconduct constituted ineffective assistance of counsel. We disagree.

To preserve the issue of prosecutorial misconduct, a defendant must raise a timely and specific objection. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Because defendant failed to do so, this issue is unpreserved. We review unpreserved allegations of prosecutorial misconduct for plain error. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). Under the plain error rule, defendant bears the burden of showing actual prejudice, and reversal is only warranted if the error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial

proceedings, independent of the defendant's innocence. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant failed to preserve this issue by moving for a new trial or a *Ginther*[1] hearing before the trial court, our review is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). We review questions of constitutional law de novo. *LeBlanc*, *supra*.

During recross-examination, the prosecutor asked defendant whether he had had lunch with his attorney. He replied that he had. She then questioned him about additions to his testimony on redirect examination. During closing argument, the prosecutor stated:

> How else do you know he's a liar? Because he adds on and exaggerates things and embellishes after the fact to try to get you to—to make you think that what happened is something different than what happened. You heard him right here in court add on and embellish. As soon as he—something popped into his mind that he can add on, he's right there with it. Oh, the knife, after he's had lunch with his lawyer and had a chance to think about it and cook up some more stuff, she really had a long knife. My knife wasn't long enough to do it. It must have been her.

It was proper for the prosecution to draw the jury's attention to defendant's additions to his testimony on redirect and recross-examination. The question is whether the prosecution's mention of defense counsel was improper, especially given the prosecution's statement about defendant having had time to "think about [his testimony] and cook up some more stuff." This Court evaluates claims of prosecutorial misconduct on a case-by-case basis, in the context of the entire record. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "A prosecutor should not question a defendant regarding conversations with his or her attorney as the 'attorney-client privilege is fundamental to our system of jurisprudence and the privilege is destroyed if [an] improper inference can be drawn from its exercise.'" *Id*. at 72, quoting *People v Foster*, 175 Mich App 311, 318; 437 NW2d 395 (1989), overruled on other grounds *People v Fields*, 450 Mich 94, 115 n 24 (1995). Nor is a prosecutor permitted to personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003).

In this case, the prosecutor's question whether defendant had had lunch with his lawyer and her comment about defendant's response during closing argument were unnecessary but the prosecutor did not suggest that defense counsel had done anything improper. As in *Dobek*, *supra* at 72, where the prosecutor asked the defendant if he had practiced his testimony with his attorney, "[t]he substance of any confidential communications was never broached." Moreover, when considered in the context of the prosecutor's entire closing argument, which consists of several paragraphs of highlighting for the jury the ways in which the evidence showed that

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant was a liar, and only one brief mention of defense counsel, it is clear that the focus of the prosecutor's argument was defendant's credibility, rather than the propriety of defense counsel's conduct. In this context, any implicit invitation for the jury to infer misconduct on the part of defense counsel was not prejudicial to defendant.

Defendant also argues that his trial counsel's failure to object to the alleged prosecutorial misconduct constituted ineffective assistance of counsel. Effective assistance of counsel is presumed and a defendant bears a heavy burden of proving otherwise. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005). In order to overcome the presumption, the defendant must show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. *Id*. The defendant must show that counsel's performance was so deficient that counsel was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficiency was so prejudicial that he was deprived of a fair trial in that there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. *LeBlanc*, *supra* at 582-583; *McGhee*, *supra* at 625. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Matuszak*, *supra* at 58. This Court will not revisit matters of trial strategy with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Even if defendant could show that defense counsel's failure to object to the prosecutor's alleged misconduct was unreasonable, he cannot show that the error was prejudicial. Defendant argues that the prosecutor's argument was prejudicial in that it undermined defendant's credibility, which may have meant the difference between a first-degree murder conviction and a conviction of voluntary manslaughter. However, there is no indication that an objection would have changed the outcome of the trial. There was overwhelming evidence that defendant committed first-degree murder, most of it from defendant's own testimony.

Defendant testified that, upon his girlfriend's suggestion, he carried the victim into the basement and cut his throat. He testified that he knew the victim was going to die when he cut his throat. "In order to show first-degree premeditated murder, some time span between the initial homicidal intent and ultimate action is necessary to establish premeditation and deliberation. The interval between initial thought and ultimate action should be long enough to afford a reasonable person time to take a "second look."" *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003) (internal quotations and citations omitted). About seven minutes passed between the time defendant's girlfriend told defendant they needed to kill the victim and the time defendant cut the victim's throat. This lapse of time was sufficient to establish the premeditation and deliberation required for a first-degree murder conviction. It can also be inferred from defendant's testimony that he contemplated his girlfriend's statement that the victim was Duran's cousin, and that it was therefore necessary to kill the victim, before moving the victim to the basement and cutting his throat.

Defendant's attempts to conceal the killing are additional evidence of premeditation. See *Gonzalez*, *supra*. According to his own testimony, defendant obtained a GMC Envoy, drove it to the house, and helped his girlfriend put the victim's body into the vehicle. He then drove to Delrae, where he and his girlfriend left the victim's body in an alley. When they returned home, they cleaned the house with bleach, and defendant burned the Envoy the following night. In addition, defendant's statement to police that the victim was lying on the floor "knocked out"

when defendant and his girlfriend were deciding what to do strongly suggests that defendant was not acting in self-defense when he subsequently cut the victim's neck.

Finally, even if the jury believed that defendant's girlfriend inflicted the injuries that ultimately killed the victim, it could still have convicted defendant under an aiding and abetting theory. In order to establish criminal liability under an aiding and abetting theory, the prosecutor must show that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time that [the defendant] gave aid and encouragement." *People v Moore*, 470 Mich 56, 67-68; 679 NW2d 41 (2004), quoting *Carines*, *supra* at 768 (change in *Moore*). Defendant testified that he kicked the victim in the head and face while he was lying on the ground, he and his girlfriend both inflicted wounds on the victim, he helped carry the victim down to the basement and back upstairs, obtained a vehicle and used it to dispose of the victim's body, helped clean the house afterwards, and burned the vehicle. Given the overwhelming evidence of defendant's guilt under either theory, defendant has not shown that, had trial counsel objected to the prosecutor's question and statement, the outcome of the trial would likely have been different.

Defendant's third argument on appeal is that the trial court erred in ordering reimbursement of attorney fees without considering defendant's ability to pay. We agree.

Under *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), a trial court need not make a specific finding on the record of the defendant's ability to pay. "However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id*. at 254-255. The amount of reimbursement ordered "should bear a relation to the defendant's *foreseeable* ability to pay." *Id*. at 255. The court may also consider the defendant's capacity for future earnings. *Id*.

The prosecution asks this Court to initiate the conflict resolution procedure in MCR 7.215(J) "to correctly resolve the constitutional question decided in *Dunbar*." In a recent order, our Supreme Court directed the Monroe County Prosecuting Attorney and the Child Support Division of the Office of the Attorney General to address the issue whether *Dunbar* was correctly decided. *People v Arnone*, 728 NW2d 866 (2007). In a subsequent order, the Court noted that it had received the requested answer, vacated "that portion of the sentence of the Monroe Circuit Court that ordered the defendant to pay attorney fees," and, citing *Dunbar*, *supra* at 252-256, remanded to the trial court "for a decision on attorney fees that considers the defendant's ability to pay now and in the future." *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007). This order reflects a recent decision by our Supreme Court that *Dunbar* was correctly decided. Accordingly, we decline the prosecution's invitation to initiate the conflict resolution proceeding under MCR 7.215(J), and decide defendant's appeal of this issue under *Dunbar*.

In this case, the trial court made no determination regarding defendant's ability to pay before ordering $1,940 in reimbursement of attorney fees, despite having adequate information to make such a determination in the presentence investigation report. Accordingly, we vacate the

trial court's Final Order for Reimbursement of Attorney Fees and Order to Remit, and remand "for the court to reconsider its reimbursement order in light of defendant's current and future financial circumstances." See *Dunbar*, *supra* at 256.

Defendant raises a fourth issue in a standard 4 brief. He argues that his trial counsel was ineffective for failing to utilize evidence of a bloody handprint found at the scene that matched the DNA of neither defendant nor his girlfriend. In addition, he argues that counsel was ineffective for failing call his girlfriend as a witness. We disagree.

Two police officers testified at trial that they had observed what appeared to be a bloody handprint on the doorjamb inside defendant's house. However, the forensic biologist who testified about the DNA evidence in this case testified that no DNA analysis was performed on the sample from the doorjamb because it had tested negative for blood. Defendant claims that his "trial counsel informed him that the DNA results from the bloody handprint matched neither [defendant nor his girlfriend]." This contradicts the forensic biologist's testimony. Even if it were true, defendant's argument that the evidence indicates that a "third person"—presumably, he means someone other the victim—was at the scene, lacks merit since counsel's alleged statement does not exclude the possibility that the DNA from the handprint matched that of the victim. Defendant has not overcome the presumption that any decision his attorney made with respect to this evidence was a matter of trial strategy, much less shown that this alleged error was prejudicial.

Defendant also alleges that trial counsel's failure to call defendant's girlfriend as a witness constituted ineffective assistance. This argument also fails because there is no indication that, even if his girlfriend had waived the privilege against self-incrimination, her testimony would have been favorable to defendant. See *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992). Her testimony may well have contradicted defendant's suggestion that she inflicted more serious wounds than defendant. According to defendant's testimony, he cut the victim's throat with a pocketknife with a one and a half inch blade, while she stabbed the victim with a large hunting knife and struck him with a hammer. In addition, there is no indication that, even if his girlfriend had testified and corroborated defendant's testimony, the outcome of the trial would likely have been different. As discussed above, the jury could still have found him guilty of first-degree murder under an aiding and abetting theory.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood